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In The

Supreme Court of the United States

October Term, 1976

No. 76-1124

JOSEPH E. GEDRA,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

MEMORANDUM FOR THE COMMONWEALTH OF VIRGINIA IN OPPOSITION

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Counsel for Respondent

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1. On July 2, 1975, the petitioner, Joseph Gedra, was charged with operating a church in a single family dwelling without a special use permit in violation of Section 30-2.2.1 of the Fairfax County Zoning Ordinance. He was tried initially before the Fairfax County General District Court

and was found guilty of the offense. Gedra appealed this conviction to the Circuit Court of Fairfax County where, on November 10, 1975, he was tried before a jury and was again found guilty of violating the Ordinance. His punishment was fixed at $50.00[1] and costs.

2. Gedra filed his Notice of Appeal and Assignment of Error from his Circuit Court conviction on December 10, 1975. Thereafter, he filed his Petition for a Writ of Error in the Supreme Court of Virginia. The Commonwealth filed her Brief in opposition to the Petition requesting, *inter alia,* that the Court dismiss the appeal because of Gedra's failure to comply with Rule 5:9 of the Rules of the Supreme Court of Virginia[2] which sets forth the requirements for making a written statement of facts, testimony or other incidents of the case a part of the record of appeal.[3] On November 16, 1976, the Supreme Court of Virginia rejected Gedra's Petition and refused a writ of error, "the court being of the opinion that the appeal was not perfected in the manner required by law." (Pet. App. A-1).[4]

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[1] Under Virginia law, a violation of a local zoning ordinance can only be punished by the imposition of a fine not to exceed $1,000.00. *See Va. Code Ann.* § 15.1-491(e) (Cum. Supp. 1976).

[2] The Commonwealth flatly denies that her counsel was recalcitrant in their dealings with opposing counsel or that her counsel was responsible for the failure of opposing counsel to perfect the appeal. In this regard, the affidavit of Michael J. Cassidy, Assistant Commonwealth's Attorney for Fairfax County, is set forth in the Appendix to this Memorandum at App. 1-App. 10. Furthermore, while a statement of facts was agreed to, it is not the statement of facts which appears in the Petition.

[3] Rule 5:9(c), as it was in force at the time of the appeal in question, is set forth in the Appendix to this Memorandum at App. 11.

[4] The reference to "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

3. The Supreme Court of Virginia has held that Rule 5:9 is jurisdictional and that "failure to comply therewith will result, as in the present case, in dismissal, either before or after appeal is awarded. * * * [D]ismissal will continue to be the price of failure to comply with mandatory rule provisions." *Towler* v. *Commonwealth*, 216 Va. 533, 535, 221 S.E.2d 119, 121 (1976). In *Towler* the Supreme Court of Virginia took the opportunity "to reiterate the jurisdictional nature of Rule 5:9 and to reemphasize that necessity of compliance with its mandatory requirements . . . .[B]ecause [they] have observed far too many violations of this rule; and [they] lament the numerous instances in which [they] have been forced to dismiss appeals because of failure to observe the rule's requirements." *Id.* at 534, 221 S.E.2d at 121. It is clear, therefore, that the procedural requirements embodied in Rule 5:9 are not novel, nor were they fashioned for the first time in this case.

4. The decision of the Supreme Court of Virginia did not involve a federal question. Rather, it rests upon an adequate State ground, failure to perfect the appeal under the applicable Rules of the Supreme Court of Virginia. Under these circumstances, "the statutory prerequisite [set forth in 28 U.S.C. § 1257] for the exercise of this case of the reviewing power of this court is wanting." *Newman* v. *Gates,* 204 U.S. 89, 95 (1907). *See also Hammerstein* v. *Superior Court,* 341 U.S. 491, 492 (1951); *Chesapeake & Ohio R. Co.* v. *McDonald,* 214 U.S. 191 (1909).

5. Furthermore, the federal question raised by the petitioner is insubstantial. As a great many other localities have done, Fairfax County has enacted a comprehensive land use ordinance in which the land within its boundaries is zoned into several categories. The use which may be made of the

land depends upon the category into which the land has been zoned. In the instant case, the land in question is in a one family residential one acre (RE-1) district. In an RE-1 District there are several "uses of right" which are permitted, *e.g.*, single family dwellings. There are other uses permitted in an RE-1 District if a special use permit is obtained. Section 30-7.2.6.1.11 of the Fairfax Ordinance specifies that if a special use permit is obtained, the following uses are permitted in an RE-1 District: "Churches, chapels, temples, synagogues, convents, monasteries, seminaries, nunneries, and other places of worship, including Sunday schools and other uses appurtenant thereto; . . . ."[5] The petitioner did not obtain such a special use permit.

6. This Court has previously upheld the constitutionality of a local zoning ordinance which totally banned churches from a residential district. *See Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). Indeed, in *Corporation of Presiding Bishop, C.J.C.L.D.S.* v. *Porterville,* 338 U.S. 805 (1949), this Court "dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas." *American Communications Ass'n.* v. *Douds,* 339 U.S. 382, 398 (1950). *See also Corporation of Presiding Bishop, C.J.C.L.D.S.* v. *Porterville,* 203 P.2d 823 (Cal. 1949). Here, the ordinance does not constitute an absolute ban on churches in RE-1 Districts. Rather, it permits churches if a special use permit is obtained. Under these circumstances, the Fairfax Ordinance is plainly constitutional. *Cf. Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 9 (1974).

[5] There are many other uses in addition to those specified in Section 30-7.2.6.1.11 for which a special use permit is required before they will be permitted in an RE-1 District. Because they are not germane to the Petition, however, they have not been set forth herein.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ANTHONY F. TROY
Attorney General of Virginia

D. PATRICK LACY, JR.
Chief Deputy Attorney General

MASTON T. JACKS
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Counsel for Respondent

May 5, 1977

APPENDIX

COMMONWEALTH OF VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

v.

FATHER JOSEPH E. GEDRA

Defendant.

AFFIDAVIT

I, Michael J. Cassidy, Assistant Commonwealth's Attorney for Fairfax County, Virginia, hereby depose and say that:

These are the facts regarding the lack of a Statement of Facts for the case of *Commonwealth of Virginia* v. *Joseph E. Gedra* to the best of my knowledge. Prior to my involvement in this matter, a motion was filed for the presentation of a Statement of Facts to Judge Thornton. That motion was sent by mail on January 8, 1976 and requested a hearing date of January 24, 1976. (Item 1). This mailing was within a day of the "sixty days from final judgment" limit for delivery of a written statement of facts required by Rule 5:9 of the Rules of the Supreme Court of Virginia. I was informed that Mr. John Matonis was unable to appear that day because of other commitments. The motion was taken off of that day's motions docket.

The matter was dropped until a substantially similar Statement of Facts and another motion for the signature of the trial judge were filed on March 19, 1976, over four months after the trial (Item 2). At the request of the petitioner, the motion was set for March 26, 1976. This counsel was present at 10:00 A.M. when court convened. The motion was called at approximately 10:30 A.M. Neither defense counsel was present in court at that time. An individual in priestly attire and fitting the description of Rev. Gedra was present in the court at that time but made no response

when the case was called. Since Mr. Lawrence Keenan, the trial prosecutor, had left this office for private practice and I had not been present at the trial, I submitted a prosecution version of the facts prepared by Mr. Keenan. The judge suggested that the matter should be sorted out in chambers with both counsel present, and then moved on to the next case. Sometime around 11:00 A.M. Mr. Matonis appeared in the Juvenile and Domestic Relations Court to which I had been assigned. He complained that he could not find the court room. I gave counsel a copy of the Commonwealth's Statement of Facts and suggested he set up a conference as requested by the judge. No such conference was ever arranged by Mr. Matonis, and I never saw him again. A review of my file shows only subsequent correspondence demanding my signature on other statements.

Contact was re-established in September of 1976, beginning with a letter to Mr. Keenan from Mrs. Helen Lane (Item 3 and 4). I cannot remember who was able to reach the other first by telephone, but as a result of a discussion of the case with Mrs. Lane, she requested and received copies of a substantial portion of my file. Many of the items sent were documents served on me by the Petitioner of which she, as local counsel, was unaware. A conference between Mrs. Lane, Mr. Keenan and myself was held sometime at the end of October or the beginning of November. Mr. Keenan delayed a trip out of town for a meeting. A statement was agreed upon (Item 5) and everyone left. The document was to be submitted for the judge's signature after it was typed. After Mr. Keenan had departed for Portsmouth, Virginia, Mrs. Lane returned to my office and wanted to rework the statement. Unable to get in touch with Mr. Keenan and not having been at the trial, I refused. I do not recall agreeing to arrange a meeting with

Judge Thornton. However, there was some discussion of appearing together before Judge Thornton for his signing of the agreed Statement of Facts. This was frustrated when a Circuit Court secretary informed me that Judge Thornton would be in Fairfax, when in fact he was going to Prince William County (the other half of his judicial circuit) on a particular day. Rather than delay Mrs. Lane, I suggested she take the signed statement to the judge rather than insisting that I be present. That statement was signed on the eve of the trial's anniversary.

It should be noted that the Statement of Facts signed by myself and the trial judge is not the one contained in the petition before this Court.

/s/ Michael J. Cassidy
Michael J. Cassidy
Assistant Commonwealth's Attorney

* * *

Item 1

* * *

NOTICE

To: Robert F. Horan, Jr., Esq.
Commonwealth's Attorney, Fairfax County
Lawrence R. Keenan, Esq.
Assistant Commonwealth's Attorney, Fairfax County
Fairfax County Courthouse
Fairfax, Virginia

Sirs:

Please Take Notice that the attached Statement of Facts on Appeal will be presented to the Honorable Percy

Thornton, Jr., Judge, for signature on January 24, 1976, a Motions Day in the Circuit Court of Fairfax County.
Dated: January 8, 1976

Yours, etc.,

Father Joseph E. Gedra

* * *

Item 2

* * *

NOTICE

Robert F. Horan, Jr., Esq.
Commonwealth's Attorney
Fairfax County
Fairfax County Courthouse
Fairfax, Virginia

Sir:

Please Take Notice that on the 26th day of March, 1976, Appellant-Defendant will present the attached statement of facts on appeal to the Honorable Percy Thornton, Jr., Judge, Circuit Court, Fairfax County, Fairfax County Courthouse, Fairfax, Virginia.

Dated: March 16, 1976

* * *

Item 3

Memo From The Desk Of

HELEN SCRYMGEOUR LANE

September 14, 1976

To: Lawrence Keenan, Esquire

Michael Cassidy, Ass't C.A., Fairfax County

Made copies of my only copy of the Statement of Facts for the *Gedra* Appeal which is part of the Petition for Appeal, which you, Mike, probably have.

Heard from John Matonis yesterday and he believed when he filed the Petition hurriedly that he had previously sent a copy to you, Larry. Perhaps you turned in that earlier copy when you turned over the rest of the C.A. files and papers.

At any rate, if you agree with it, the judge can sign it therewith. If there is not agreement, please call me and we'll set a time to amend it to satisfy both parties. When the copy is signed please send it directly to the Clerk for filing with that which is already there signed by John and myself.

Item 4

Lawrence R. Keenan
Attorney at Law

4085 Chain Bridge Road
Fairfax, Virginia 22030

(703) 273-6103

September 16, 1976

Helen S. Lane, Esquire
4924 Little Falls Road
Arlington, Virginia 22207

Re: Commonwealth v. Gedra

Dear Mrs. Lane:

I received today your statement of facts and have forwarded the same to Mike Cassidy of the Commonwealth Attorneys Office. Mr. Cassidy, to my knowledge, is in possession of a more accurate statement of facts in this case. I would respectfully suggest you contact Mike, get a copy of his statement of facts, and if it proves acceptable, adopt it as your statement of facts.

If Mr. Cassidy's statement of facts does not prove adequate to your needs, I will be more than glad to put myself at your and Mr. Cassidy's disposal so that we may try to resolve whatever questions or disagreements arise concerning the facts of the Gedra case.

In regard to the statement of facts you sent me, pages 3, 4, and 5 appear to state the facts in a light most favorable to Father Gedra's position. That is understandable. However, the statement which is found on page 6 in the second paragraph, beginning with the words, "This statement of facts . . . ," is totally unacceptable to me. An unsupported

statement such as this apparently is presented to the Supreme Court as an excuse for something that was not performed earlier. I am also curious as to whether the time limitations in regard to making a statement of facts part of the record, has already run.

I realize that Mr. Matonis has left you in a difficult position. I sincerely apologize for any inconvenience my departing the Commonwealth Attorney's Office may have caused you in this case.

Sincerely,

Lawrence R. Keenan

LRK/jaf
cc: Michael Cassidy, Esquire
Commonwealth Attorney's Office

Item 5

* * *

STATEMENT OF FACTS

On April 28, 1975, Mr. Lennart Konczy, a Zoning Inspector for Fairfax County, entered a house in a residential neighborhood which was owned by the Church of the Assumption, an unincorporated church, located at 10310 Vale Road, Vienna, Fairfax County, on the corner of Hunter Mill Road and Vale Road. Mr. Koneczy entered for the purpose of determining whether or not church services were being conducted there in violation of a County Ordinance. Once inside, he observed that such services were being held. What he observed was the celebration of the Latin Mass according to the Latin ritual of the Roman Catholic Church. Father Gedra and his parishioners, as well as other Roman Catholics, prefer to attend the Latin Tridentine Mass rather than

the New Order Mass officially prescribed by the Roman Catholic Churches that are accepted by the Bishop of the Arlington Diocese. Catholics who regularly attend Mass in Father Gedra's church travel from various parts of Virginia and Maryland and the District of Columbia.

Father Gedra's home is located on a one-acre lot zoned one-family residential (RE-1). Neither he nor the Church of the Assumption obtained a Special Use Permit to conduct Mass services at 10310 Vale Road. This is required by the County Ordinance in question. Father Gedra and his church had applied for a Special Use Permit and after hearings it was denied. Father Gedra could have appealed this decision, but he did not.

Counsel for Father Gedra and the church, John Joseph Matonis, advised Father Gedra, the church and its parishioners by a written opinion letter dated on or about January 25, 1975, that if the parking and traffic problems were handled by the parishioners parking somewhere else and being shuttled to Father Gedra's church, he would then have a constitutional right to celebrate Mass in his house before the congregation. Said counsel advised Father Gedra that, under the above conditions, the celebration of Mass in his home was protected by the constitutional guarantees of religious freedom, and that he need not apply and have approved his request for a Special Use Permit.

The church took possession of the house and grounds at 10310 Vale Road in 1972 and immediately started holding church services. From then until the present time, the number of persons attending Mass on Sunday and Holy Days averaged between 20 and 25 persons per service. On Sunday morning, Father Gedra had conducted two services, one at nine o'clock a.m., and one at eleven o'clock a.m. This he did on the day of Mr. Koneczy's inspection. Father Gedra usually celebrates Monday through Saturday Mass alone,

but on some occasions, parishioners have attended Mass in Father Gedra's house on weekdays.

The building resembles a residential house and has no steeples, crosses or any other architectural structures that would make the building look like a church. There is a sign on the front lawn that reads "Assumption Rectory."

Father Gedra celebrates Mass at an altar he built in his living room. Seats are placed in this room and in an adjoining dining room. Candles and other religious artifacts can be seen in the living room near the altar.

The driveway in front of the house is large enough for 13 or 14 cars, but is completely filled if that many cars are parked there. The driveway is accessible from both Hunter Mill Road and Vale Road. The lots in the area are as spacious as 10310 Vale Road. Adjoining 10310 on Hunter Mill Road and on Vale Road are similar lots with single family dwellings. Across Vale Road is an even larger lot with a single family dwelling. Across Hunter Mill Road is undeveloped land.

Since 1972, those who know about the parking at nearby Flint Hill Elementary School and the shuttle service to 10310 Vale Road park at the school parking lot about a mile away and are shuttled to and from Mass. However, some of the congregation attending Mass on any given Sunday do not know about the parking and shuttle policy and park in the driveway.

Defendant applied to the trial court to subpoena Mr. Horan, and the Court refused.

During his summation, the prosecutor said to the jury, in effect: "In essence, Father Gedra said to the community, 'screw your rights. Mine are superior.' "

The prosecutor argued to the jury that the conducting of a Mass in a private house used as a church without a Special Use Permit, was a violation of law that should be stopped.

Dated: November ...., 1976

John Joseph Matonis
Helen S. Lane
Counsel for Defendant

/s/ Helen S. Lane
Helen S. Lane

Robert F. Horan, Jr.
Commonwealth Attorney

By:
/s/ Michael J. Cassidy
Michael J. Cassidy
Ass't Commonwealth Attorney

/s/ Percy Thornton, Jr.

—Submitted and approved November 9, 1976

Percy Thornton, Jr.
Circuit Court Judge

* * *

RULE 5:9. TRANSCRIPT OR WRITTEN STATEMENT

* * *

(c) A written statement of facts, testimony or other incidents of the case becomes a part of the record when:

(i) a copy is mailed or delivered within sixty days after entry of final judgment to opposing counsel together with notice that the statement will be presented to the judge no earlier than ten days nor later than twenty days after such notice; and

(ii) the statement is signed by the judge and filed in the office of the clerk. The judge may sign the statement forthwith if it is signed by counsel for all parties.